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THE AMERICAN PRESIDENCY: STATESMANSHIP AND CONSTITUTIONALISM IN BALANCE

by Walter Berns

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America today is in need of leadership of the sort provided in the past by our greatest presidents, presidents whom we mean to honor and praise when we denominate them "statesmen." Our familiar habit of associating wisdom or propriety or goodness with constitutionality bespeaks our attachment to the Constitution and thereby to constitutionalism.

We are equally in favor, it seems, of statesmanship and of constitutionalism, and a strong argument can be made that we need them both.

The paradox that I want to explore here consists in, if not the incompatibility of the two—for, after all, the greatest of our presidents, Abraham Lincoln, displayed his statesmanship by saving the Constitution—then, at least, in the tension that exists between them.

It can be said truthfully that the Founding Fathers took such care in the writing of the Constitution because they—who were great statesmen—distrusted statesmen. They saw the necessity of constructing a system that did not depend on statesmanship. To leave room for statesmanship is to leave room for the exercise of discretion and, indeed, power, and power is dangerous.

"We shall never prevent the abuse of power if we are not prepared to limit power in a way which occasionally may also prevent its use for desirable purposes." That was written by a Nobel Laureate, a famous liberal (in the European sense of that term), and a friend of Hillsdale College, Friedrich Hayek.[1] As Werner Dannhauser has pointed out, however, Hayek, who advocates classical liberalism as a system where bad men can do the least harm, "never discusses whether liberalism is not, by the same token, the system in which good men, especially statesmen, can do the least good."[2]

If a statesman is someone who "takes his orders directly from God," and not from the laws of men, including the law of the constitutions men write,

im•pri•mis (im-pry-mis) adv. In the first place. Middle English, from Latin *in primis*, among the first (things)....

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constitutionalism tends to believe that God doesn't speak audibly or unambiguously to men—even though some men claim otherwise, at least on behalf of their own aural powers. As Dannhauser went on to point out, "anyone who is inclined simply to dismiss the wisdom of the Founding Fathers in circumscribing the possibilities of statesmanship should first ponder the fact that this nation has been able to survive a large number of bad presidents."[3]

Statesmanship is the capacity to do what is good in the circumstances, as Professor Mansfield puts it,[4] and its possibility depends on the presence of persons who know what is good *and* enjoy the freedom to do it. Constitutionalism is acting according to

fundamental laws designed to limit that freedom, laws of procedure and sometimes of substance.

The statesmen who wrote the Constitution of the United States were profound students of constitutionalism, of limited government. Indeed, the principles of constitutionalism cannot be separated from the principles of the American regime which are delineated in the Declaration of Independence. To understand the reasons for constitutionalism and the distrust of statesmanship, it is necessary to say something about the political philosophy that informs the Declaration of Independence.

The Declaration asserts the self-evident truth that all men are, by nature, endowed with certain unalienable rights and that they institute government "to secure these rights." By nature government does not exist; it is an artifact made by man. By nature rights do exist, but they are insecure; which is to say, men have rights but they cannot be enjoyed outside government or in the state of nature. To understand why this is so, we must turn to the founding father of liberalism, Thomas Hobbes.

Writing in the middle of the seventeenth century, more than a hundred years before the Declaration of Independence, Hobbes was the first political philosopher to take his bearings from the rights that men possess by nature. Because, as Hobbes argued, men are naturally selfish and vain, they seek power after power, which they can exercise only over other men. Since there is no government in the state of nature, the consequence is the state of war. The fundamental right of nature is self-preservation, but since everyone is himself the executor of that law, and there is no law to restrain him as he does whatever he thinks necessary to preserve his own life, the life of every man is "solitary, poor, nasty, brutish, and short." He needs government.

The trouble is, he brings into civil society all his passions, especially his vanity and the thirst for power. He is hard to govern. He insists on substituting his own judgment for that made by kings or the civil law. Especially if he is a priest—what we would call an intellectual—he teaches disobedience of the laws. The result, too frequently, is civil war.

Hobbes's solution to this was the contract by which all men agreed to give up their natural right, to do whatever is necessary to defend and preserve themselves, to a sovereign whom they create by this contract. Henceforth, the sovereign represents them all. Since in the state of nature each man was an absolute ruler, empowered to do anything to secure his rights, the sovereign who succeeds to these rights is an absolute ruler. His job is to preserve peace and thereby secure these rights.

But what is to prevent the sovereign from misruling? This problem was solved, in practice if not in principle, by the Englishman John Locke, sometimes referred to as "America's philosopher," who wrote a few years after Hobbes and accepted all of his principles. In Locke's teaching, however, when men enter into the contract with one another to institute government and secure their rights, they yield their natural rights not to a sovereign person but to the law. Every man yields his

natural power to preserve himself and finds security in the laws.[5]

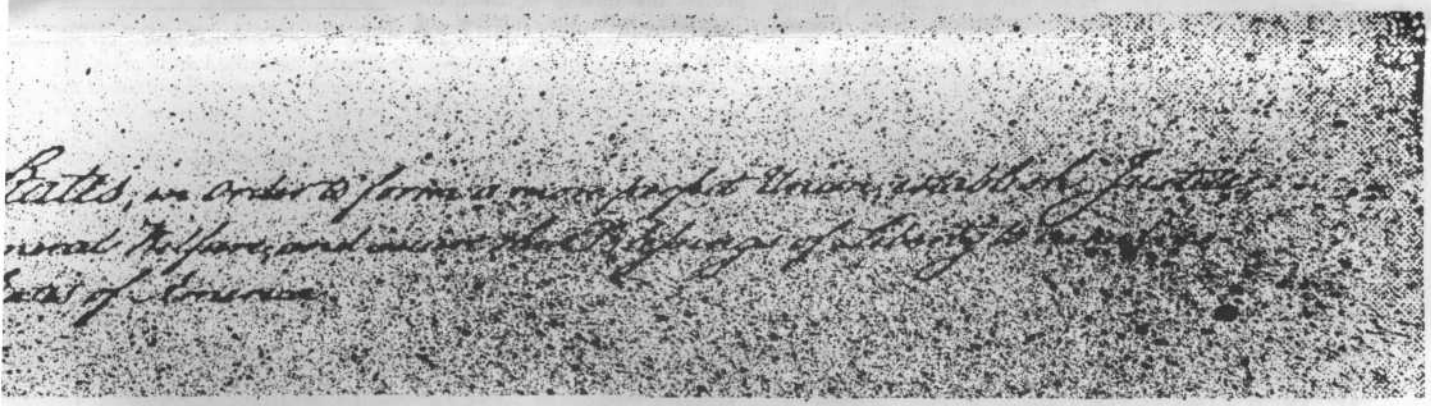
Now, these laws are, in principle, as absolute as Hobbes's sovereign. Whatever Hobbes's sovereign may do to secure rights, may in principle be done by Locke's civil society through law. But misrule by law is less likely than misrule by a sovereign. In the first place, everyone is subject to the laws, even those who make them. Then, secondly, the lawmaking or legislative power can be institutionalized, and institutions can themselves be subjected to laws or rules of procedure. For example, the legislative power can be divided—in a constitution made by the people who have yielded their natural rights—between two branches, and an executive can be given a share of it in the form of a veto. In short, protection against absolute power can be secured by means of carefully designed institutional devices. They make limited government possible, and this is constitutionalism.

Constitutionalism is an attempt to confine the rule of men over men to the rule of law. It is the attempt to convert the power that one man would exercise over others into a system whereby power takes the form of law that every man gives to himself. It should be clear that, stated in this essential form, constitutionalism and statesmanship are incompatible. They are incompatible because this constitutionalism recognizes or embodies the fundamental equality of all men, whereas statesmanship rests on inequality in an important respect: that some men, or some one man, knows better than all men (whose judgment is expressed in the law) what should be done.

Interestingly enough, modern statesmanship does not make this extreme claim. In what is probably the most instructive discussion of this subject, the late Herbert J. Storing asked whether the presidency is in the constitutional order or outside it. He meant by this whether the President's constitutional powers were confined to adminstering or enforcing the laws adopted by Congress, or, on the contrary, whether he was given some authority to act outside the law.

John Locke, the direct source of the principles of our political understanding, long ago formulated Storing's same question in this way: can there be any room for prerogative in constitutional government, with prerogative defined as the power to act without the benefit of law and sometimes even against the letter of law? His answer was yes, and in the scope of that answer may be found the basis for the legitimacy of statesmanship under modern constitutionalism. This proves to be a constricted statesmanship. Here's Locke on prerogative:

> This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called "prerogative"; for since in some governments the lawmaking power is not always in being, and is usually too numerous and too slow for the dispatch requisite to execution, and because it is also impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigor on all occasions and upon all persons that may come in their way, therefore there is a latitude left to the executive power to do many things of choice which the laws do not prescribe.[6]



So prerogative, or the realm of statesmanship, is, in the first place (according to this authoritative account), the power to do what the laws would do if the lawmaking power were "in being." Its justification is not that a statesman knows better than the people but, rather, that the people are not assembled to make the law; they are home plowing the fields for the spring or fall planting. And prerogative is, in the second place, the power to do what the laws would do if the laws could foresee what should be done, as well as the power to make exceptions in the execution of the laws, exceptions governed by a judgment as to whether it would be good to apply them or not.

Let us apply these principles to one action taken by

Lincoln shortly after he became President and was faced with armed insurrection. Armed bands of brigands were blowing up railroad tracks and bridges in Maryland, and otherwise doing whatever was in their power to prevent federal troops from reaching the capital at Washington in order to defend it against armies launched by the so-called Confederate States of America. The lawful government of Maryland did little to apprehend these brigands, and the national government could not depend on the judges to allow them to be convicted in a fair trial even if the Maryland executive brought them to trial.

Lincoln (to use the Constitution's language) suspended the privilege of the writ of habeas corpus. He authorized the army to apprehend, hold, and not to bring to trial, anyone who interfered with the transportation of troops. A lawful use of prerogative? Yes, he insisted, because the Constitution authorized suspension of the privilege of habeas corpus, and, although its place in the Constitution suggests that this was a judgment to be made by Congress, Congress was not in session. Therefore, Lincoln did no more than the laws would have done had the lawmaking authority been able to act.

But what if it can be shown that Lincoln, who had the constitutional authority to call Congress into session, deliberately did not exercise it and, instead, did what, in his judgment, Congress ought to have done but which he was not sure Congress would do if given the opportunity? Does the Constitution, or fidelity to constitutionalism, permit this prerogative? To state the matter baldly, who is Abraham Lincoln to preempt the legislative authority—to take the law into his own hands?

Yet, are we not grateful to him for having done so? Are we really willing to abide rigidly by the rules of constitutionalism, laid down with the view to preventing bad men from doing harm, or do we see the Constitution as allowing, on exceptional occasions (and who defines such occasions), good men to do good? As I said at the beginning, we Americans are all in favor of constitutionalism *and* we are all in favor of statesmanship.

At least we are in favor of what might be called a democratic statesmanship, one that does not assert a claim of superiority on the part of the statesman—Lincoln, who was one of the most extraordinary men ever to live, made a practice of concealing himself behind a very democratic facade—and one that limits itself to actions designed to securing our rights. We would not brook, or tolerate, an Alexander, a Caesar, a Napoleon (the three "towering geniuses" the 29-year-old Lincoln referred to in his remarkable speech to the Young Men's Lyccum of Springfield,[7]) or even a de Gaulle.

Such men impose a rule over others; they change the way of life of the people they rule; they change the constitution. They claim a superiority to the people, a right to govern. And from the very beginning, because of the Hobbes-Lockean principles embodied in our Declaration of Independence, we insist that the so-called government has no right to govern us.

This is why, whereas the British speak of the Churchill government, the Thatcher government, or the Disraeli or Gladstone governments, and even the Canadians speak of the Trudeau government, we Americans speak of the Washington, Lincoln, Carter, or Reagan *administrations*. The purpose of the Reagan Administration today, equally with that of the Washington Administration two centuries ago, is, as Storing has put it, to facilitate "the peaceful enjoyment of private life."[8] We may, on occasion, require extraordinary leadership, but, in principle, this is leadership required to so arrange our affairs that we can go about our private business. We want no one—as we would be inclined to put it—to mess around with our souls.

That there have been men of this order is suggested by this statement made by the greatest of German poets—indeed, one of the greatest poets simply, Goethe:

> A great dramatic poet if he is at the same time productive, and is actuated by a strong *noble* purpose, which pervades all his works, may succeed in making the soul of his pieces become the soul of the people. I should think that this was something well worth the trouble. From Corneille proceeded an influence capable of forming heroes. This was something for Napoleon, who had need of an heroic people. On which account, he said of Corneille, that if he were still living, he would make a prince of him.[9]

Lincoln was the American poet in this sense: he changed us with his words. But he did so always with reference to the Declaration of Independence and, as I said, he never pretended to be anything but a common man. As he said in response to a request for autobiographical details, "Why, it is great folly to attempt to make anything out of me or my early life. It can all be condensed into a single sentence you will find in Gray's *Elegy*: 'The short and simple annals of the poor.' That's my life, and that's all you or anyone else can make of it."

It is sufficiently clear from the records of the period that the Founders, however attached they were to constitutionalism, and however distrustful they were of statesmanship, were as persuaded as was Locke that the President must be able to exercise prerogative, the power to act without the benefit of law and sometimes even against the law. The President was not to be elected by or responsible to the law-making body. He was to exercise a constitutionally established *executive* power, a power the best of our presidents have not hesitated to use: to seize private property, to emancipate slaves, to send troops against non-taxpaying whiskey distillers, or to Lebanon, Vietnam, Arkansas, and Mississippi, to spend money not appropriated and refuse to spend money appropriated, to send the fleet around the world, and so on; the list is a long one.

Nor was the President to be elected directly by the

people, a procedure one of the Founders likened to submitting a choice of colors to a blind man. Here, and in other of their constitutional provisions, they disclosed their principal apprehension concerning the future of government in the United States, the fear that popular government (to which they were firmly committed) would degenerate into populism, giving the people what they want as soon as they want it.

From the Founders' point of view, nothing could be more inappropriate than such modern gimmicks as the constitutional amendment, proposed a few years ago by Senators Packwood and Abourezk, which would have allowed direct lawmaking by the people. As the Founders saw it, the solution to the problems of democracy was *not* more democracy. On the contrary, it was the provision of some distance between the people and the political officials, distance to be used to refine the popular view, to do what ought to be done rather than what the people want done, to provide some scope for leadership or statesmanship.

The danger in our time is that political officials will do only what they think is popular. Rather than government better than the people, the tendency—here in the words of Jimmy Carter—is to aim for government as good as the people. It is as if our presidents, our legislators, and even our judges, lack all confidence in their own judgment or know of no principled way to act independently of the will of the people. Thus, the Supreme Court ignores the Constitution, which it is sworn to uphold against even the popular will, and renders judgments calculated to bring law and policy in line with what it regards as popular.[10]

The danger we face today, in other words, is not statesmanship in the sense in which the Founders used the term, but rather the opposite. The danger is that the President, the judiciary, or the bureaucracy, will refuse to abide by the rules of the law that comes out of our constitutional system, and will bend that law in what they regard as the direction indicated by the popular will.

Here is merely one example of what I have in mind: Congress enacts the Civil Rights Act of 1964, Title VII of which forbids an employer to discriminate against any individual with respect to his "compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." To make it absolutely clear that this did not require or permit what we now call affirmative action, Title VII went on to provide that this did not mean that any person, or group, should be given "preferential treatment." Yet, in case after case, the Supreme Court, with the acquiescence of Congress and the President, has upheld preferential treatment of one sort or another.

This ignoring of the law might be called statesmanship, but it is not statesmanship of the sort the Founders left room for in their constitutional system. It is the use of extraordinary power not, as in Lincoln's case, to preserve the constitutional order, but to undermine it. It is a false and dangerous statesmanship, exercised not to restrain the tendency of popular government to degenerate into populism, but rather to strengthen that tendency. And it is directly contrary to the Founders' intentions. As Storing said, "Any American statesman whose public face is populistic is not performing his highest duty, no matter how prudent and successful his specific policies may be."[11]

[1] Friedrich Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1944), p. 237.

[2] Werner J. Dannhauser, "Reflections on Statesmanship and Bureaucracy," in Robert A. Goldwin (ed.), *Bureaucrats, Policy Analysts, Statesmen: Who Leads?* (Washington: American Enterprise Institute, 1980), p. 120.

[3] *Ibid.*, p. 121.

[4] Harvey C. Mansfield, Jr., *Statesmanship and Party Government: A Study of Burke and Bolingbroke* (Chicago & London: The University of Chicago Press, 1965), p. 17.

[5] Locke, *Second Treatise of Civil Government*, seco. 87-89.

[6] *Ibid.*, sec. 160.

[7] Roy P. Basler (ed.) *The Collected Works of Abraham Lincoln*, vol. I, p. 114.

[8] Herbert J. Storing, "American Statesmanship: Old and New," in Goldwin, *op.cit.*, p. 97.

[9] Goethe, *Conversations with Eckermann*.

[10] See, e.g., *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[11] Storing, *op.cit.*, p. 105.

The Detroit News
November 12, 1982

Hillsdale is on the march

College is strong academically, No. 1 in football

HILLSDALE — Who's No. 1?

Why, Hillsdale College is No. 1 — the only top-ranked team in the state of Michigan.

This has always been one of the sleepy stops in Michigan small college football, a quiet campus situated in the rolling hills of southern Michigan near the Ohio and Indiana state lines.

This is oil well territory. Not big. Not brassy. Not loud. The rigs sit in the fields and unless you look carefully through the withered corn, you can miss them.

Hillsdale College has also struck it rich — first with a president who believes in excellence and is willing to pay for it, then with an aggressive athletic director who has gone out and raised the money for his program and, finally, with a coach who has turned the football team into a big winner.

Under the direction of the president, Hillsdale College set out to improve itself both academically and athletically. Like everything else, that required money. They went out and raised nearly $29 million, relying on contributions from friends, alumni and foundations. They take not a penny from the government — never have and they say they never will. They like doing things their own way, without a lot of bureaucrats getting in the way. This stance of independence has held firm since the school's founding in 1844.

Of the money that was raised, $1.8 million was pledged toward improving the athletic facilities.

They have put in an Astro-Turf carpet, and next season they'll have almost 8,000 new seats, lights and a new track. They'll also have a new press box, and the prez won't have to sit on a folding wooden chair anymore.

Anyway, they're sprucing things up all around. They've improved the quality of their instructors, with the number of doctorates rising from 37 percent to 72 percent in the last 10 years.

Hillsdale has never been the most popular of the small-college football teams.

Now, the envy quotient is at its highest level, since Hillsdale is 9-0 and is ranked No. 1 among all the schools in the NAIA (National Association of Intercollegiate Athletics).

Lowry has turned the Hillsdale Chargers into a hard-hitting outfit and if no one told you otherwise, you could be watching any number of teams from the Mid-America Conference.

They don't have a training table or a lot of the other niceties that are available at larger schools. Hillsdale's enrollment is just over 1,000. About as sophisticated as they get is for Lowrey to take the whole team to the downtown show on Friday night and cook them breakfast on Saturday morning.

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